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No. 93-1470

In The Supreme Court of the United States

October Term, 1993

Tom Metzger, John Metzger, and White Aryan Resistance,
Petitioners,

v.

Engedaw Berhanu, Personal Representative of the Estate of Mulugeta Seraw,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Court of Appeals of Oregon was based upon independent and adequate state grounds when it determined that petitioners had waived certain First Amendment objections in a wrongful death case?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This wrongful death action stemmed from the brutal murder of Mulugeta Seraw in Portland, Oregon on November 13, 1988. Five defendants were originally named in this lawsuit—two from Oregon and three from California.

The two Oregon defendants—Kenneth Mieske and Kyle Brewster—were alleged to have carried out the actual killing. The California defendants (petitioners here)—Tom Metzger, John Metzger, and the White Aryan Resistance (WAR)—were alleged to be vicariously liable for the slaying under three theories. *First*, plaintiff claimed that the California defendants—through the vice president of their WAR youth organization—had substantially assisted in and encouraged the conduct of the

Oregon defendants that caused Seraw's death. *Second*, plaintiff claimed that the California defendants and the Oregon defendants had engaged in a conspiracy to commit acts of racial violence and that Seraw had been killed pursuant to the conspiracy. *Third*, plaintiff claimed that Seraw's death was caused by the California defendants' recklessness in selecting an agent to send to Portland to organize the Oregon defendants' skinhead gang.[1]

A. Factual Background [2]

White Aryan Resistance ("WAR") is a white racist organization that advocates racial violence against African-Americans, Hispanic-Americans, and Jews. Exs. 68, 75. Petitioner Tom Metzger is the director of WAR. His son, petitioner John Metzger, heads WAR Youth, the "youth section" of WAR. Ex. 8. Prior to Seraw's murder, the Metzgers, through the youth wing of WAR, sought to encourage violent racist attacks by skinheads. Ex. 53 at 1. In an effort to expand the WAR organization, the Metzgers dispatched their best organizer, David Mazzella, the vice-president of WAR Youth, Ex. 53 at 3; Tr. 155, 434, to Portland, Oregon to establish a working relationship with one of the Portland skinhead groups, East Side White Pride (ESWP). Tr. 422, 578-79; Ex. 1 (J. Metzger letter to ESWP introducing Mazzella).

From the time he arrived in Portland in the beginning of October 1988 until Seraw's murder five weeks later, Mazzella spent most of his time "getting [ESWP members] together and teaching them violence" by "taking them out" to commit violent acts against minorities and by "preaching." Tr. 488. Through his efforts, Mazzella

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[1] Hereinafter, the first theory for liability will be referred to as the "substantial assistance" claim, the second as the "conspiracy" claim, and the third as the "reckless selection of an agent" claim.

[2] Respondent is obliged to submit this factual background due to the numerous inaccuracies and omissions contained in petitioners' statement. Sup. Ct. R. 15.1.

transformed ESWP from a "sloppily organized group" into one that had "something to focus on." Tr. 488-89. On several occasions, Mazzella led the members of ESWP on "hunting parties" to seek out minorities and provoke fights. Tr. 429-35, 654-56. As Mazzella explained, "the best way to really talk [to skinheads] about violence is to show them the violence." Tr. 435. In one letter, Mazzella bragged that "ESWP [had] . . . beaten up 80 people in 4 days." Ex. 145.

With the Metzgers' approval, Mazzella had used violence before to organize skinheads for WAR. Tr. 431-35. While he was repeating the pattern in Portland, Mazzella kept in close contact with the Metzgers. Tr. 488-89. Tom Metzger clearly approved of Mazzella's Portland activities on behalf of WAR Youth. In a recorded message broadcast shortly before Seraw's murder, Metzger boasted that "the fights and attacks against the race-mixers and some of the race traitors and the racial scum [in Portland], has been picking up because of the new warriors moving into the area." Ex. 86 at 1.

Mazzella spent much of the day of Seraw's murder with the members of ESWP, including the Oregon defendants. In the morning, Mazzella held a meeting, during which they discussed sporadic, random acts of violence against minorities. Tr. 445-46. As Mazzella later testified, "*every time the group would go to a low, when there wasn't really much publicity, we would commit acts of violence.*" *Id.* (emphasis added). That evening, after distributing WAR material in downtown Portland, Mazzella and several ESWP mmbers met to discuss "the movement." Tr. 611. During the discussion, one ESWP member drew a picture in Mazzella's WAR notebook of a black man with a bullet being shot through his head. Tr. 610-11, 760-61; Ex. 138.

As the Oregon defendants were leaving the meeting, they spotted Mulugeta Seraw [3] and two of his Ethiopian

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[3] Seraw was a twenty-eight year old Ethiopian national. Born to a farming family, he had come to Portland to go to college. Tr.

friends. Tr. 373. Just as Mazzella had trained them to provoke minorities on numerous occasions, the ESWP members tried to irritate Seraw and his companions. Tr. 249-50. They attacked the three Ethiopian men, and with repeated blows to the head with a baseball bat, Mieske crushed Seraw's skull. Tr. 359-60, 378; Ex. 163.

Within hours, Mieske and other ESWP members told Mazzella about the killing. Tr. 453-54. The next day, Mazzella reported the incident to Tom Metzger. Tr. 455-56. Metzger told Mazzella to keep his "mouth shut," advice that Mazzella shared with ESWP. Tr. 456-57. When Mieske was arrested, he immediately called Tom Metzger in San Diego. Tr. 181, 1007. In acordance with his standard operating procedure, Metzger advised Mieske to take the Fifth. Tr. 181, 269.

In an interview conducted just three weeks after the murder, John Metzger boasted that Mazzella, whom he identified as his vice-president, had successfully organized Portland skinheads for the Metzgers' WAR organization. Metzger emphasized that "skinheads these days are deadlier than the skinheads of just two years ago," and offered to "send Mazzella or another organizer to Seattle to try to repeat the success in Portland." Ex. 139, 139A.

B. Procedural Background

On November 27, 1989, the personal representative of Mulugeta Seraw's estate filed a wrongful death action in the Mulnomah County (Oregon) Circuit Court, pursuant to Oregon Revised Statutes § 30.020, against Mieske, Brewster, and the petitioners herein—Tom Metzger, John Metzger, and WAR.

Although petitioners retained counsel on appeal, they represented themselves in the trial court. Petitioners

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1235, 1239. He was a small man, standing only five feet seven inches and weighing about 135 pounds. Tr. 1181. He was known as a quiet and friendly person. Tr. 1214, 1243.

claim that they were forced to proceed without counsel because respondents had frozen their real property in a California state court action.[4] Petition at 8. But petitioners fail to disclose that the California case was not filed until six months *after* this case began. At no time during the intervening months did petitioner choose to hire a lawyer despite their substantial financial resources[5] and the obvious risks posed by this litigation. Furthermore, at no time after the filing of the California action—an action prompted by Tom Metzger's attempt to fraudulently convey his property—did Metzger ask the California court for permission to use the real property to hire a lawyer.

In any event, petitioners were given abundant assistance in litigating their case. The trial judge instructed petitioners every step of the way regarding procedural

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[4] Shortly after the commencement of this suit, petitioner Tom Metzger transferred real property in California worth over $90,000 to his wife by quitclaim deed for no consideration. Respondent filed an action on May 11, 1990 in San Diego County Superior Court seeking to set aside this transfer, asserting that the transfer had been made to shelter Metzger's assets from a potential judgment in the Oregon action and any other creditors. Appendix at 2a-4a. The San Diego County complaint also sought to have Metzger restrained from transferring or disposing of this property until the Oregon trial. *Id.* at 4a-5a. After a temporary restraining order was issued against them, 6a-7a, Metzger and his wife entered into a stipulation agreeing not to transfer this property until sixty days after the Oregon trial ended. Appendix at 8a-13a.

[5] During the trial, financial records pertaining to petitioners Tom Metzger and WAR were introduced into evidence. Metzger had two bank accounts, one for WAR and the other for his business, Fallbrook TV. Tr. 1093-94. These records established that, during 1989, deposits into WAR's bank account alone averaged approximately $3000.00 per month. Pls. Ex. 105 at 2. Although John Metzger testified at trial that approximately seventy percent of WAR's income was received in cash, Tr. 918, the cash deposits into the WAR account amounted to only fourteen percent of the total deposits. Pls. Ex. 105 at 3.

issues. For example, prior to charging the jury, the court explained to petitioners the necessity of objecting to any instructions with which they disagreed. As the court told petitioners,

> what you should do is go through the requested instructions and determine whether there are any instructions you object to? [sic] If you have objections to their [plaintiff's] proposed instructions, you must be able to state your objections for the record so that I can determine whether or not to sustain or overrule your objections to the proposed instruction.

The court later told petitioners that they would have to take an exception to the court's rulings on jury instructions in order to preserve an issue for appeal.

In addition, the trial judge allowed the Oregon chapter of the American Civil Liberties Union (ACLU) to brief the First Amendment issues raised by the case as a friend of the court. At the oral argument of these issues, the ACLU informed the court that it had no First Amendment concerns about either of the intentional misconduct counts—substantial assistance and conspiracy. Tr. 1281. The ACLU directed all of its concerns to the "reckless selection of an agent" claim. *Id.*

Petitioners joined this objection to the "reckless selection" claim, citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Tr. 1296-99. In denying this objection, the trial court clearly stated that it was interpreting petitioners' objection as being solely on this claim. Tr. 1299-1300. Petitioners did not make any attempt to correct the trial court's understanding of their objection. *Id.* at 1300. After the trial court denied petitioners' motion to dismiss the "reckless selection" claim, petitioner Tom Metzger stated that

> I would just like to make a motion to dismiss the entire case. They haven't proved it. They haven't

> proved their case. They certainly haven't proved intent.

Id. at 1302. The trial court similarly denied this motion. *Id.* at 1303.

The trial court included several jury charges to ensure that petitioners would not be held liable for speech or action that was protected under the First Amendment. Before the Oregon jury adjourned to consider the evidence, the trial court instructed the jury that

> [t]he right of free speech protects a person's right to express political or social ideas. It even protects a person's right to advocate the abstract need for violence sometime in the indefinite future.
>
> But the right of free speech is not absolute. *It does not allow a person to prepare a group for violent action and spur it on to such action in the immediate or near future.*
>
> I instruct you that if you find by a preponderance of the evidence that John Metzger, Tom Metzger or WAR, through an agent, prepared Kenneth Mieske or Kyle Brewster for violent action and spurred them on to such action in the immediate or near future, the free speech defense fails.

Jury Charge Number 31 (emphasis added). This instruction was patterned after the standard set forth in *Noto v. United States*, 367 U.S. 290, 297-98 (1961), which was reaffirmed as recently as 1982. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). Petitioners failed to object to this instruction, even though they were given opportunities to do so both when the instruction was discussed and later at the end of the discussion regarding all instructions. When the trial court asked whether petitioners had "[a]ny problems with Plaintiff's

Number 31," petitioner Tom Metzger explicitly stated that they did not.[6]

The court further charged the jury that they

> must be careful not to base your decision about the responsibility of Tom Metzger, John Metzger, or WAR in any way on the fact that they may have expressed views that are unpopular. The First Amendment guarantees every person the right to express his views freely, even if those views may be morally repugnant to the rest of the community. *But, the First Amendment does not prevent you from looking at the words of the Metzgers and WAR as evidence of what they may have done or what they may have instructed other people to do.*

Jury Charge Number 39 (emphasis added.) This instruction was based directly on language in *Claiborne Hardware*, 458 U.S. at 927. Petitioners' objection to this instruction was overruled.

The jury found petitioners liable for the wrongful death of Seraw on three separate theories: 1) that petitioners, through their agents, substantially assisted in, or encouraged, the conduct which caused the death of Seraw; 2) that petitioners were involved in a conspiracy that led to Seraw's death; and 3) that petitioners caused the death of Seraw by recklessly selecting or retaining agents to organize the racist skinhead organization. The jury awarded respondent one set of damages based on the three verdicts, and the trial court entered judgment in accordance with the jury's verdict, with slight modifications.

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[6] Petitioners' failure to object to this instruction waived any assertion of error based on the instruction under Oregon procedure. Oregon Rule of Civil Procedure 59(H) ("no instruction given to a jury shall be subject to review on appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception is made immediately after the court instructs the jury"); *see Berhanu v. Metzger*, 850 P.2d 373, 374 (Or. App. 1993); *Utility Equipment, Inc. v. Morbark Industries, Inc.*, 763 P.2d 164, 169 n.5 (Or. App. 1988), *aff'd*, 779 P.2d 139 (Or. 1989).

The Court of Appeals of the State of Oregon affirmed the judgment against petitioners. *Berhanu v. Metzger*, 119 Or. App. 175, 850 P.2d 373 (1993). In response to their First Amendment assignment of error, the court determined that petitioners had failed to preserve any First Amendment objection to the substantial assistance and conspiracy claims. The court based this determination on its review of the record and the fact that the trial court, without objection, specifically ruled only on petitioners' First Amendment objection to the reckless selection of an agent claim. 850 P.2d at 375. Pursuant to Oregon law, the court held that it could not provide petitioners any relief because "even if [the court] were to agree with [petitioners] that the recklessness claim is barred by constitutional considerations, the trial court's judgment would nonetheless stand because of the verdict on the two other theories of liability." *Id.* at 375-76.[7] The Oregon Supreme Court denied petitioners' request to review the decision of the Court of Appeals. 865 P.2d 1296 (Or. 1993).

REASONS FOR DENYING THE WRIT

Petitioners concede that they failed to raise specific First Amendment objections to either theory of intentional misconduct. Petition at 9. Nonetheless, petitioners seek to have this Court review the state procedural grounds for the decision of the Oregon Court of Appeals and remand this case to that court to consider their waived First Amendment defenses. Petition at 15.

Respondents respectfully submit that this Court should not grant certiorari to review the decision of the Court of Appeals of Oregon because: (1) the decision was based upon independent and adequate state grounds; and

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[7] The Oregon Court of Appeals, in applying this rule, was following established Oregon precedent that when a special verdict form is used, as here, the submission of an erroneous theory of liability does not warrant reversal if the verdict also is supported by a second theory not similarly flawed. *See Byers v. Santiam Ford, Inc.*, 574 P.2d 1122, 1124 (Or. 1978).

(2) even if this Court did have jurisdiction to review this decision, the issues raised by petitioner are not be suitable for granting certiorari because the decision does not conflict with any decision of this Court or raise any question of federal law that is unsettled by this Court.

I. THIS COURT HAS NO JURISDICTION TO REVIEW THE DECISION OF THE COURT OF APPEALS OF OREGON WHICH WAS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS

The Oregon Court of Appeals based its decision on its interpretation and application of Oregon Rule of Appellate Procedure 5.45.[8] This Court has long recognized that it is without jurisdiction to review the decision of a state court when the state court's decision is based on an adequate state ground that is independent of any federal basis. *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Wood v. Chesborough*, 228 U.S. 672, 677 (1913). "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan v. Long*, 463 U.S. at 1040.

Noncompliance with a state procedural rule, such as the failure to object in a timely manner or raise an issue in the trial court, provides such an adequate state ground. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991); *Webb*

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[8] This rule provides that

> [n]o matter assigned as error will be considered on appeal unless it was preserved in the lower court . . .

O.R.A.P. 5.45(2). The only exception to this rule recognized under Oregon procedure exists for "errors of law apparent on the face of the record." *Id.* The rationale for this requirement that a claim be presented to the trial court is "to allow the adversary to present his position and to permit the court to understand and correct any error." *State v. Brown*, 800 P.2d 259, 265 (Or. 1990); *State v. Hitz*, 766 P.2d 373 (Or. 1988).

v. Webb, 451 U.S. 493, 496-97 (1981) ("the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows . . . that the federal claim was adequately presented in the state system"); *Edelman v. California*, 344 U.S. 357, 358-59 (1953). To provide a federal ground for decision, even Federal constitutional rights must be presented to state courts in accordance with the requirements of general state procedure. As this Court stated in *Ford v. Georgia*, "a 'firmly established and regularly followed state practice' may be interposed to prevent subsequent review by this Court of a federal constitutional claim." 498 U.S. at 424 (citation omitted).[9] So long as the state court applies its procedure in a consistent manner,[10] "powerful policy considerations . . . strongly indicate that [this Court] should apply this principle with sufficient rigor to make reasonable certainty that [the Court] entertain[s] cases from state courts only where the record clearly shows that the federal issue has been properly raised below." *Webb*, 451 U.S. at 499.

The decision of the Court of Appeals of Oregon affirming the trial court and rejecting petitioners' First Amendment contentions was based on its application and interpretation of an Oregon procedural rule. Because this determination was based upon an independent and adequate state procedural ground, this Court does not have juris-

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[9] *See Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978) ("[f]ailure to present a federal question in conformance with state procedures constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule"); *Edelman*, 344 U.S. at 358-59 ("this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law.").

[10] Petitioners have raised no issue that O.R.A.P. 5.45 has not been consistently applied to all litigants by the courts of Oregon. *See Barr v. City of Columbia*, 378 U.S. 146, 149-150 (1964); *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964). Nor would any such argument have merit.

diction to review the decision of the Court of Appeals of Oregon.

II. NOTWITHSTANDING THIS LACK OF JURISDICTION, THE CONSIDERATIONS THAT USUALLY SUPPORT CERTIORARI ARE ABSENT HERE

Even if this Court were to determine that the decision of the Court of Appeals of Oregon did not rest on independent and adequate state grounds and therefore this Court had jurisdiction to consider petitioners' contentions, the petition would not be suitable for certiorari. Review on writ of certiorari is not a matter of right, but of judicial discretion. Rules of the Supreme Court of the United States 10. This Court will exercise the discretion to grant the writ in a case such as this only when the matter involves 1) a decision that conflicts with a decision of this Court, or 2) an important question of federal law, unsettled by this Court. *Id.* at 10.1(c). In the present action, no such issue exists.

A. The Oregon Court of Appeals Decision Does Not Conflict With Any Decision of This Court

Petitioners contend that a First Amendment right may only be relinquished by a civil defendant by means of a "knowingly, intelligently and voluntarily" waiver of those rights. Petition at 17. The "knowing, intelligent and voluntary" standard asserted by petitioners, however, has been applied by this Court only to the waiver of constitutional protections by criminal defendants. *See, e.g., Colorado v. Spring*, 479 U.S. 564 (1987); *Miranda v. Arizona*, 384 U.S. 436 (1966). Petitioners assert that the decision of the Oregon Court of Appeals conflicts with this Court's decision in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Petition at i (Question Presented), 17. However, as this Court noted in *Curtis Publishing*, a "known right or privilege", even involving federal constitutional grounds, may be procedurally waived during a civil trial by not properly raising it. *Id.* at 143.

In *Curtis Publishing*, this Court invoked an exception to the general rule regarding procedural waiver for situations in which a party failed to "interpose [a constitutional] defense prior to the announcement of a decision which might support it." *Id.* at 143. The petitioner in *Curtis Publishing* had been found responsible by a jury for the libel of a public figure just prior to this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Although petitioner had not asserted a *Times* defense during trial, petitioner filed a motion for new trial in the trial court immediately after the *Times* decision was rendered. While this Court acknowledged that "even constitutional objections may be waived by a failure to raise them at a proper time," it held that petitioner had not waived his *Times* defense because the defense was not a "known right or privilege" at the time that petitioner was tried. 388 U.S. at 143. In the present action, all rights or privileges now asserted by petitioners were known and firmly established, as there were no new decisions at issue.

B. The Oregon Court of Appeals Decision Does Not Raise Any Question of Federal Law That Is Unsettled by This Court

Petitioners do not seek an adjudication of their federal First Amendment rights, but merely request this Court to remand this case to the Court of Appeals of Oregon to consider their First Amendment objections to the intentional misconduct claims. Petition at 15. To do so, this Court must hold that even if a party does not comply with State procedural rules, a party cannot inadvertently waive a First Amendment objection. Even if the Court were willing to consider such a rule, this case would be an inappropriate one in which to do so because petitioners' failure to assert a First Amendment defense to the two intentional misconduct claims was knowing and intelligent.

During the proceedings before the trial court, petitioners were aware of all of the rights that are now the basis of their petition and each of these asserted rights was well-established at the time it properly would have been asserted. The First Amendment defense now relied upon by petitioner to challenge all three bases of liability before this Court was argued before the trial court to challenge only the "reckless selection" count. It is clear that petitioners only presented a First Amendment objection to the reckless selection claim because their objection was based upon the amicus argument of the ACLU. *See supra* at 6. The ACLU indicated that it had no First Amendment concerns regarding the intentional misconduct claims. Petitioner, being fully aware of this argument at the time of trial, had a duty under Oregon procedure to explicitly object to the substantial assistance and conspiracy counts on First Amendment grounds at the appropriate time.[11]

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[11] To the extent that any First Amendment rights were implicated, they were properly addressed and protected by the trial court. The First Amendment protects "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence." *Brandenburg*, 395 U.S. at 448 (quoting *Noto*, 367 U.S. at 297-98); *see Claiborne Hardware*, 458 U.S. at 928. But it does not protect speech or actions of an individual "preparing a group for violent action or steeling it to such action." *Noto*, 367 U.S. at 298; cited with approval in *Claiborne Hardware*, 458 U.S. at 928; *Brandenburg*, 395 U.S. at 448.

This Court has recognized that a "State legitimately may impose damages for the consequences of violent conduct." *Claiborne Hardware*, 458 U.S. at 918. Furthermore, an organization "may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority." *Id.* at 930. The trial court gave an instruction patterned after *Noto*, and the evidence established that petitioners had in fact "prepar[ed] a group for violent action" and "steel[ed] it to such action."

CONCLUSION

For the foregoing reasons the writ should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

[Filed May 11, 1990]

SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

Case No. 624088

ENGEDAW BERHANU, Personal Representative of the Estate of MULEGETA SERAW, Deceased,
Plaintiff,

v.

TOM METZGER, KATHLEEN METZGER, and DOES I through X, Inclusive,
Defendants.

COMPLAINT TO SET ASIDE FRAUDULENT TRANSFER AND FOR DAMAGES

[CC § 3439.01, et seq.]

Plaintiff alleges:

FIRST CAUSE OF ACTION
(TO SET ASIDE FRAUDULENT TRANSFER)

1. Defendants are, and at all times herein mentioned were, residents of San Diego County, California and have been husband and wife, cohabitating at 308 Sunbeam lane, Fallbrook, California for over twenty years.

2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through X, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is

informed and believes and thereon alleges that each of the fictitiously named defendants claims an interest in the property hereinafter described and which is the subject of this action.

3. From and after November 13, 1988 the Estate of Mulgeta Seraw has been the holder of a certain claim against Defendant TOM METZGER. This claim consists of a tort cause of action for wrongful death and punitive damages.

4. On November 27, 1989, an action was commenced by Plaintiff against Defendant TOM METZGER based on the aforementioned claim. No judgment in that action has yet been rendered. This matter is set for trial on October 8, 1990 in Multnomah County, Oregon.

5. At all times herein mentioned, Defendants TOM METZGER and KATHLEEN METZGER as joint tenants, were the owners and in possession and control of that real property situated in San Diego County, known as 308 Sunbeam Lane, Fallbrook, California and more particularly described as follows:

> The North 77.50 feet of the South 495 feet of the East 128 feet of the West 328 feet of the Northeast Quarter of Section 25, Township 9 South Range 4 West, San Bernardino Base and Meridian, in the County of San Diego, State of California.

6. Plaintiff is informed and believes and thereon alleges that on or about January 2, 1990, Defendant TOM METZGER transferred by quitclaim deed the above-described property to Defendant KATHLEEN METZGER. On February 8, 1990, transfer of said real property was recorded as Document No. 90 072119, Image No. 51, Official Records in the Office of the County Recorder of San Diego County, California.

7. Plaintiff is informed and believes and thereon alleges that the transfer was made with an actual intent to

hinder, delay, or defraud Defendant TOM METZGER's creditors, including Plaintiff in the collection of his claims.

8. In exchange for the aforementioned transfer, Defendant TOM METZGER received nothing. At the time the transfer was made, the value of equity in the real property transferred was not less than $90,000.00. Thus, the Defendant TOM METZGER did not receive reasonably equivalent value in exchange for the real property.

9. Plaintiff is informed and believes and thereon alleges that the above-described property was received by Defendant KATHLEEN METZGER with knowledge that Defendant TOM METZGER intended to hinder, delay, or defraud the collection of Plaintiff's aforementioned claim. Defendant KATHLEEN METZGER had such knowledge by virtue of her confidential relationship with Co-Defendant TOM METZGER, her husband.

SECOND CAUSE OF ACTION
(CONSPIRACY)

10. Plaintiff refers to and incorporates herein Paragraphs 1 through 9, inclusive, of the First Cause of Action.

11. As alleged above, in or about January, 1990, Defendants TOM METZGER and KATHLEEN METZGER agreed and knowingly and willfully conspired between themselves to hinder, delay and defraud Plaintiff in the collection of his claim against Defendant TOM METZGER.

12. Under this conspiracy, the above-named Defendants agreed to transfer their property held in joint tenancy as husband and wife, to wife alone so that any judgment against Defendant husband could not be collected. This asset is the only substantial asset of Defendant TOM METZGER, leaving him insolvent in the face of Plaintiff's judgment. Defendant transferred his only substantial

assets within three weeks of being served with Plaintiff's complaint in the wrongful death action.

13. Defendants TOM METZGER and KATHLEEN METZGER did the acts and things herein alleged pursuant to, and in furtherance of, the conspiracy and agreement alleged above.

14. As a proximate result of the wrongful acts herein alleged, Plaintiff has suffered general damages and punitive damages should be awarded in an amount in excess of the jurisdictional minimum of this court.

15. At all times mentioned herein, Defendants KATHLEEN METZGER and TOM METZGER knew of Plaintiff's claim against TOM METZGER and knew that Plaintiff's claim could only be satisfied out of the real property transferred by TOM METZGER. Notwithstanding this knowledge, Defendants KATHLEEN METZGER and TOM METZGER intentionally, willfully, fraudulently, and maliciously did the things herein alleged to defraud and oppress Plaintiff. Plaintiff is therefore entitled to exemplary or punitive damages in an amount to be determined at trial.

WHEREFORE, Plaintiff prays judgment as follows:

ON THE FIRST CAUSE OF ACTION:

1. That the conveyance from Defendant TOM METZGER to Defendant KATHLEEN METZGER be set aside and declared void as to the Plaintiff herein to the extent necessary to satisfy Plaintiff's claim;

2. That Defendants KATHLEEN and TOM METZGER be restrained from disposing of the property conveyed until trial of this matter.

3. That a temporary restraining order be granted Plaintiff enjoining and restraining Defendants KATHLEEN and TOM METZGER and their representatives, attorneys, and agents from selling, transferring, conveying, encumbering or otherwise disposing of any of the

property transferred to KATHLEEN METZGER by TOM METZGER;

ON THE SECOND CAUSE OF ACTION AGAINST DEFENDANTS, AND EACH OF THEM, AS FOLLOWS:

4. For general damages in the sum in excess of the jurisdiction limit of this court;

5. For special damages in an amount to be proven at trial;

6. For exemplary or punitive damages in an amount to be determined at trial.

ON ALL CAUSES OF ACTION:

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

DATED: 5-11-90

LAW OFFICES OF
JAMES E. MCELROY

By: /s/ James E. McElroy
JAMES E. MCELROY
Attorneys for Plaintiff

[Verification Omitted in Printing]

[Filed May 16, 1990]

SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

Case No. 624088

ENGEDAW BERHANU, Personal Representative of the Estate of MULEGETA SERAW, Deceased,
Plaintiff,

v.

TOM METZGER, KATHLEEN METZGER, and DOES I through X, Inclusive,
Defendants.

ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

[C.C.P. § 527]

On reading the Ex Parte Application of Plaintiff on file in the above-entitled action, the Declaration of James E. McElroy, and the Memorandum of Points and Authorities submitted therewith, and it appearing to the satisfaction of the court that this is a proper case for granting an order to show cause and a temporary restraining order, and that unless the temporary restraining order prayed for in the complaint be granted, great or irreparable injury will result to Plaintiff before the matter can be heard on notice.

IT IS HEREBY ORDERED that the above-named Defendants, and each of them, appear in Department 35 of this court, located at 220 W. Broadway, San Diego, on June 14, 1990 at 9:00 a.m., or as soon thereafter as the matter may be heard, then and there to show cause, if any they have, why they, and each of them, and their agents,

servants, employees, and representative should not be enjoined and restrained during the pendency of this action from engaging in, committing, or performing, directly or indirectly, any and all of the following acts: selling, transferring, conveying, encumbering or otherwise disposing of the subject property as described in the Application.

IT IS FURTHER ORDERED that pending the hearing and determination of the Order To Show Cause, the above-named Defendants, and each of them, and their officers, agents, employees, representatives, and all persons acting in concert or participating with them, shall be and they are hereby restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts: selling, transferring, conveying, encumbering, or otherwise disposing of the subject property as described in the Application.

IT IS FURTHER ORDERED that copies of the Complaint and this Order To Show Cause And Temporary Restraining Order be served on Defendants, and each of them, not later than May 16, 1990. Oppo Served & Filed by 10:00 a.m. 6-6-90 (Fax permissible)-Reply Due 6-11-90.

Let the above Order issue on Plaintiff's filing a bond in the sum of $7,500.

/s/ Philip D. Sharp
PHILIP D. SHARP
Judge of the Superior Court

[Filed Jun. 14, 1990]

SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

Case No. 624088

ENGEDAW BERHANU, Personal Representative of the Estate of MULEGETA SERAW, Deceased,
Plaintiff,

v.

TOM METZGER, KATHLEEN METZGER, and DOES I through X, Inclusive,
Defendants.

STIPULATION AND ORDER
RE: INJUNCTION AND RESTRAINING ORDER

IT IS HEREBY STIPULATED by and between the parties, and ordered by this Court, that Defendants TOM METZGER and KATHLEEN METZGER, and each of them, their officers, agents, employees, representatives, and all persons acting in concert or participating with them, shall be and they are hereby restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts: selling, transferring, conveying, encumbering or otherwise disposing of the subject property commonly known as 308 Sunbeam Lane, Fallbrook, California and more particularly described as follows:

> The North 77.50 feet of the South 495 feet of the East 128 feet of the West 328 feet of the Northeast Quarter of Section 25, Township 9 South Range 4 West, San Bernardino Base and Meridian, in the County of San Diego, State of California.

This Order shall remain in effect until sixty days after final judgment is entered in the Oregon case of *Berhanu v. Metzger, et al*, No. A 8911-07007 (Cir.Ct., Multnomah County, Oregon).

Bond of $7,500.00 to continue in favor of TOM METZGER and KATHLEEN METZGER.

TOM METZGER and KATHLEEN METZGER have read this Stipulation and Order, understand the terms, agree to abide by said terms and acknowledge receipt of two copies of the Stipulation and Order. This Stipulation was voluntarily entered into and negotiated between the parties.

TOM METZGER and KATHLEEN METZGER understand that violation of this Order may constitute contempt of court and result in punishment or penalties imposed against them by this Court.

Dated: June 8th, 1990 /s/ Tom Metzger
TOM METZGER

Dated: June 8th, 1990 /s/ Kathleen Metzger
KATHLEEN METZGER

Dated: June 11, 1990 /s/ James E. McElroy
JAMES E. MCELROY
Attorney for Plaintiff,
ENGEDAW BERHANU

IT IS SO ORDERED

Dated: June 14, 1990 /s/ Thomas S. Leroy
THOMAS S. LEROY
Judge of the Superior Court

[Notary Omitted in Printing]

[Filed Oct. 15, 1990]

SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

Case No. 624088

ENGEDAW BERHANU, Personal Representative of the Estate of MULEGETA SERAW, Deceased,
Plaintiff,

v.

TOM METZGER, KATHLEEN METZGER, and DOES I through X, Inclusive,
Defendants.

STIPULATION FOR ENTRY OF JUDGMENT

IT IS HEREBY STIPULATED by and between Plaintiff ENGEDAW BERHANU and Defendants TOM METZGER and KATHLEEN METZGER, by and through themselves and their respective counsel, that judgment in the above entitled case be entered in favor of Plaintiff and against Defendants as follows:

1. That Defendant KATHLEEN METZGER convey by way of quitclaim deed to THOMAS L. METZGER and KATHLEEN E. METZGER as joint tenants, the subject property commonly known as 308 Sunbeam Lane, Fallbrook, California, and more particularly described as follows:

> The North 77.50 feet of the South 495 feet of the East 128 feet of the West 328 feet of the Northeast Quarter of Section 25, Township 9 South Range 4 West, San Bernardino Basin Meridian in the County of San Diego, State of California.

2. That Defendants THOMAS L. METZGER and KATHLEEN E. METZGER, and each of them, their officers, agents, employees, representatives, and all persons acting in concert or participating with them, shall be and are hereby restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts: selling, transferring, conveying, encumbering, or otherwise disposing of the subject property commonly known as 308 Sunbeam Lane, Fallbrook, California and more particularly described as in Section 1 above.

3. That said restrictions imposed on Defendants THOMAS L. METZGER and KATHLEEN E. METZGER regarding this subject property located at 308 Sunbeam Lane, Fallbrook, California shall remain in effect only until 60 days after final judgment is entered in the Oregon case of *Berhanu v. Metzger, et al.*, #A8911-07007 (Cir.Ct., Multnomah County, Oregon).

4. That each party shall bear his/her own costs, disbursements and attorneys' fees.

Dated: 10-6-90

/s/ Tom Metzger
TOM METZGER
Defendant

Dated: 10-6-90

/s/ Kathleen Metzger
KATHLEEN METZGER
Defendant

Dated: 10-15-90

/s/ James E. McElroy
JAMES E. McELROY
Attorney for Plaintiff,
ENGEDAW BERHANU

[Filed Oct. 29, 1990]

SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

Case No. 624088

ENGEDAW BERHANU, Personal Representative of the Estate of MULEGETA SERAW, Deceased,
Plaintiff,

v.

TOM METZGER, KATHLEEN METZGER, and DOES I through X, Inclusive,
Defendants.

JUDGMENT ON STIPULATION FOR ENTRY OF JUDGMENT

[Entered Oct. 30, 1990]

In the above entitled case, Plaintiff ENGEDAW BERHANU and Defendants TOM METZGER and KATHLEEN METZGER, have stipulated by and through themselves and their respective counsel, that judgment be entered in favor of Plaintiff and against Defendants as follows:

1. That Defendant KATHLEEN METZGER convey by way of quitclaim deed to THOMAS L. METZGER and KATHLEEN E. METZGER as joint tenants, the subject property commonly known as 308 Sunbeam Lane, Fallbrook, California, and more particularly described as follows:

> The North 77.50 feet of the South 495 feet of the East 128 feet of the West 328 feet of the Northeast Quarter of Section 25, Township 9 South Range 4

West, San Bernardino Basin Meridian in the County of San Diego, State of California.

2. That Defendants THOMAS L. METZGER and KATHLEEN E. METZGER, and each of them, their officers, agents, employees, representatives, and all persons acting in concert or participating with them, shall be and are hereby restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts: selling, transferring, conveying, encumbering, or otherwise disposing of the subject property commonly known as 308 Sunbeam Lane, Fallbrook, California and more particularly described as in Section 1 above.

3. That said restrictions imposed on Defendants THOMAS L. METZGER and KATHLEEN E. METZGER regarding the subject property located at 308 Sunbeam Lane, Fallbrook, California shall remain in effect only until 60 days after final judgment is entered in the Oregon case of *Berhanu v. Metzger, et al.*, #A8911-07007 (Cir.Ct., Multnomah County, Oregon).

4. That each party shall bear his/her own costs, disbursements and attorneys' fees.

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that Plaintiff ENGEDAW BERHANU have judgment entered against Defendants TOM METZGER and KATHLEEN METZGER pursuant to the terms as set forth above and that each party shall bear his/her own costs, disbursements and attorneys' fees.

DATE Oct. 29, 1990 /s/ Judith McConnell
JUDITH MCCONNELL
Judge of the Superior Court